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Introduction: Stories of State Constitutional Law

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Introduction: The Stories of State Constitutional Law

Robert F. Williams*

Federal and state bills of rights thus serve distinct but complementary purposes. The Federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. . . .

When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

Chief Justice Leander J. Shaw, Jr.
Supreme Court of Florida¹

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1. *Traylor v. State*, 596 So. 2d 957, 962-63 (Fla. 1992). I have referred elsewhere to Chief Justice Shaw's opinion in *Traylor* as "a primer on independent state constitutional analysis." Robert F. Williams, *Review Essay: A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS L. REV. 133, 143 (1992).

For an exhaustive treatment of Florida state constitutional rights cases, see David C. Hawkins, *Florida Constitutional Law: 1991 Survey of the State Bill of Rights*, 16 NOVA L. REV. 167 (1991); David C. Hawkins, *Florida Constitutional Law: 1990 Survey of State Bill of Rights*, 15 NOVA L. REV. 1049 (1991); David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990). For a broader view, see Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long Term Prospects*, 19 FLA. ST. U. L. REV. 1053 (1992).

For a detailed study of the evolution of the text of Florida's rights protections, see Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549 (1993) and see generally JOHN F. COOPER & THOMAS C. MARKS, JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* 381-508 (1992).

Given the willingness of the legislature to propose amendments, the availability of the initiative process to the citizenry, and the frequent review by appointed commissions, it is clear that this history of the Florida Constitution will continue to be written in virtually every election.

Sandy D'Alemberte²

These twin perspectives, the protection of individual rights under state constitutions described by Chief Justice Shaw, and the relative ease of amending state constitutions described by Sandy D'Alemberte, create a paradox for state constitutional law.³ Harry Witte described this paradox using the example of Pennsylvania:

Two fundamental principles were set down in the 1776 Constitution; the inviolability of basic, individual rights and the inherent right of the people to control, reform or abolish their government as they saw fit. While each principle may be seen as critical to one or another ideal of democracy, together they placed in potential opposition the right of the majority to govern and the right of minorities to be free of certain reaches of government.⁴

This paradox is one of the stories of state constitutional law that makes it different from federal constitutional law. There are many other stories, both about state constitutional law generally, and specifically about Florida constitutional law.⁵

The Florida Supreme Court has become one of the leading examples of the "changing faces of Southern courts."⁶ The article by Justice Gerald

2. TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 16 (1991).

3. See Harry L. Witte, *Rights, Revolution and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383 (1993).

4. *Id.* at 384.

5. For each provision in a state constitution, no matter how seemingly trivial, there is a story to be told. It may be a political story rather than a lofty, "constitutional" story. As Lawrence Friedman stated:

There was a point to every clause in these inflated constitutions. Each one reflected the wishes of some faction or interest group, which tried to make its policies permanent by freezing them into the charter. Constitutions, like treaties, preserved the terms of compromise between warring groups.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 119 (2d ed. 1985).

6. Mark Curriden, *The Changing Faces of Southern Courts*, 79 A.B.A. J. 68 (June 1993).

Kogan and Robert Craig Waters presents an invaluable look into the court's inner working, as well as both its adjudicatory and nonadjudicatory powers, which are *constitutionally* assigned.⁷

The court has included, although she has recently been nominated to the federal court of appeals, Chief Justice Rosemary Barkett, whose opinions join the "voices of . . . prominent state supreme court justices, each the first woman on her court and each an important contributor to her court in the development of state constitutional law."⁸ As Chief Justice Barkett has observed: "It is, of course, axiomatic that Florida can interpret its constitution independently of the federal courts."⁹ She has certainly made a mark on Florida's state constitutional jurisprudence. Professor Daniel Gordon's article in this Symposium traces the Florida Court's recent approach to state constitutional rights cases,¹⁰ which is part of a national debate about methodology in such cases.¹¹

7. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151 (1994); see also John E. Fennelly, *ELM Street Revisited: The Florida Supreme Court's Rulemaking Authority and the Circuit Court's Subject Matter Jurisdiction Under the Local Government Comprehensive Planning Act—Real or Imagined*, 18 NOVA L. REV. 1289 (1994); Brian E. Mattis & B. Taylor Mattis, *Erie and Florida Law Conflict at the Crossroads: The Need for Statewide Stare Decisis*, 18 NOVA L. REV. 1333 (1994). See generally Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 STETSON L. REV. 1 (1989); John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L. REV. 479 (1984).

8. Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye, and Abrahamson in Shaping the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 239, 240-41 (1989).

9. *Traylor*, 596 So. 2d at 974 (Barkett, J., concurring in part and dissenting in part); see also *Gore v. State*, 599 So. 2d 978, 988 n.12 (Fla. 1992), *cert. denied*, 113 S. Ct. 610 (1992). In *Gore*, Chief Justice Barkett stated:

I use the terms "Fifth" and "Sixth" Amendment, as opposed to "article I, section 9" and "article I, section 16" for purposes of consistency with the majority opinion. I note that under the doctrine of primacy announced in *Traylor v. State*, 596 So. 2d 957, 962-963 (Fla. 1992), I would have first analyzed *Gore's* rights under the Florida Constitution before turning to federal constitutional law.

Id. (Barkett, J., concurring); see also *Perez v. State*, 620 So. 2d 1256, 1262-64 (Fla. 1993) (Barkett, C.J., dissenting); *State v. Hume*, 512 So. 2d 185, 189-90 (Fla. 1987) (Barkett, J., dissenting).

10. Daniel Gordon, *Good Intentions—Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994); see also Harry Lee Anstead, *Florida's Constitution: A View from the Middle*, 18 NOVA L. REV. 1277 (1994); *Allred v. State*, 622 So. 2d 984, 986 (Fla. 1993).

11. See, e.g., Paul Bender & Earl M. Maltz, *Judicial Activism Under State Constitutions: Boon or Bane?*, 21 RUTGERS L.J. 1113 (1990); Earl M. Maltz, *The Dark Side of State Court*

Most of the current, fashionable stories about state constitutional law have to do with state judicial enforcement of rights protections found in the state constitutions. There are, however, a number of other important state constitutional law stories in Florida and the nation which do not involve adjudication of rights cases, nor do they involve adjudication *at all*. A striking example is the Florida Supreme Court's exercise, under the leadership of Chief Justice Arthur England, of its power to regulate the practice of law to create the Interest on Trust Accounts Program.¹² This has been, quite simply, one of the most spectacularly successful Brandeisian "state laboratory" experiments¹³ of our time, now copied by all of the states but one.¹⁴ Possibly the same will be true of the court's current innovations with respect to the *pro bono* obligations of lawyers.¹⁵

Activism, 63 TEX. L. REV. 995 (1985); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMPLE L. REV. 1153 (1992); Robert F. Utter, *Swimming In the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

12. For the early history of this program, see generally *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Interest on Trust Accounts*, 396 So. 2d 719 (Fla. 1981); *In re Interest on Trust Accounts*, 372 So. 2d 67 (Fla. 1979); *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978). The program is discussed in Randall C. Berg, Jr., *A Significant New Revenue Source for Legal Services Begins: Interest on Trust Accounts*, 15 CLEARINGHOUSE REV. 1015 (1982); Taylor S. Boone, Comment, *A Source of Revenue for the Improvement of Legal Services, Part II: A Recommendation for the Use of Client's Funds Held by Attorneys in Non-Interest Bearing Trust Accounts to Support Programs of the Texas Bar Ass'n and an Analysis of the Federal Income Tax Ramifications*, 11 ST. MARY'S L.J. 113 (1979); Taylor S. Boone, Comment, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Fla. Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539 (1979). The Internal Revenue Service approved the Program in Rev. Rul. 81-209, 1981-2 C.B. 16.

13. Justice Brandeis was, of course, referring to state legislatures when he made his famous observation: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Holmes referred to "social experiments . . . in the insulated chambers afforded by the several states . . ." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

14. The only state to refuse to adopt the program is Indiana. See *In re Public Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990).

15. Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 18 Fla. L. Weekly S348 (Fla. June 23, 1993); *In re Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065* (Legal Aid), 598 So. 2d 41 (Fla. 1992); *In re Amendments to Rules Regulating*

In Indiana, the one state still without an Interest on Trust Accounts Program, Chief Justice Randall T. Shepard recently stated:

Fifty state supreme courts have examined the questions about which my colleagues write today and forty-nine of them have reached the opposite conclusion. The fact that Indiana stands alone on this issue does not mean that we are wrong, but it certainly does not prove we are right. Instead, I think it suggests that this might be a moment to heed the advice we often give to juries: "Re-examine your views in light of the opinions of others."

Let there be no mistake: interest is being earned on "non-interest-bearing" Indiana lawyer trust accounts. This Court can choose to continue directing that interest to the financial institutions holding the accounts or it can choose to direct it to help people too poor to hire counsel or to underprivileged or minority students seeking a legal education.¹⁶

Recent years in Florida have seen the relative "rush" to *constitutionalize* a number of rights and powers. While most of these state constitutional developments are viewed as unqualifiedly "good," care must be taken by the Legislature,¹⁷ the supporters of initiative petitions,¹⁸ the Constitution Revision Commission,¹⁹ constitutional conventions,²⁰ and the voters²¹ to evaluate the relative merits and demerits of treating a topic in the state constitution. As Professor Frank P. Grad observed a generation ago:

This brings us to a consideration of the significance of treating a subject in the state constitution rather than leaving it to be dealt with by ordinary law. The significance is simply this: (1) it places the matter included in the constitution beyond change by normal lawmaking processes, and (2) it places it at the highest level of the legal authority of the state. . . .

the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 573 So. 2d 800 (Fla. 1990). An important aspect of the regulation of law practice is *admission* to the Bar. See Thomas A. Pobjecky, *The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public*, 18 NOVA L. REV. 1313 (1994).

16. *In re Ind. State Bar Ass'n*, 550 N.E.2d 311, 316 (Ind. 1990) (Shepard, C.J., dissenting).

17. FLA. CONST. art. XI, § 1.

18. *Id.* § 3.

19. *Id.* § 2.

20. *Id.* § 4.

21. *Id.* § 5.

Without anticipating the detailed consideration of the matter, it must be recognized at the outset that the twin effects of constitutional treatment have consequences which, depending on the circumstances, may be considered beneficial or harmful. The enduring quality of a provision of the state constitution may protect a desirable policy from frivolous changes by the legislature, or it may delay or prevent the change to a new and better policy from one embedded in the constitution which is no longer responsive to current needs. . . . It ought to be added, too, that the beneficial consequences are usually intended, whereas the harmful ones are, more often than not, unintended and the result of changed circumstances.²²

. . . .
It is clear that the criteria proposed will require difficult judgments of degree, and the factors taken into consideration may be evenly balanced. But in view of the fact that all of the provisions in a state constitution operate as limitations on the legislature and on the government as a whole, and in view of the fact that the cost of including a proposal is likely to be high in the terms described, the burden of proof concerning the need for inclusion should be squarely on its proponent, and any doubts on the issue should be resolved *against* inclusion and in favor of the freedom of government to respond to emerging problems without constitutional limitations, express or implied.²³

The constitutionalization of such matters as victims' rights,²⁴ bans on local mandates,²⁵ privacy,²⁶ and open government and records requirements²⁷ indicates the ability, noted by Sandy D'Alemberte above, of

22. Frank P. Grad, *The State Constitution: Its Function and Form For Our Time*, 54 VA. L. REV. 928, 946 (1968).

23. *Id.* at 972.

24. See FLA. CONST. art. I, § 16(b); Patrick B. Calcutt, Comment, *The Victims Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights*, 16 FLA. ST. U. L. REV. 811 (1988).

25. See FLA. CONST. art. VII, § 18; Nancy Perkins Spyke, *Florida's Constitutional Mandate Restrictions*, 18 NOVA L. REV. 1403 (1994); Eric B. Smith & Kraig A. Conn, *Amendment 3: A Proposition to Limit Unfunded State Mandates*, FLA. B.J., Oct. 1990, at 72.

26. See John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775 (1994).

27. See FLA. CONST. art. I, § 24, art. III, § 4(c); Patricia A. Gleason & Joslyn Wilson, *The Florida Constitutional Open Meetings Amendments; Article I, Section 24 and Article III, Section 4(e), Florida Constitution, Let the Sunshine In*, 18 NOVA L. REV. 973 (1994).

Florida's reputation for state constitutional protection of open government is nationwide. See, e.g., *In re* 42 Pa. C.S. § 1703, 394 A.2d 444, 450 n.11 (Pa. 1978). The court stated:

Florida's citizens to change the "history of the Florida Constitution . . . in virtually every election."²⁸ By the same token, the comparably easy amendment to Florida's state constitutional search and seizure protection,²⁹ requiring "forced linkage" with interpretations of the Federal Fourth Amendment,³⁰ reflects the relatively unstable nature of such rights under an easily changeable constitution. This leads to the paradox described by Professor Witte above.³¹ People in Florida must be careful not to "love the state constitution to death."

Still, as noted by Professor Grad, even the best state constitution will "occasionally require amendment and revision . . . to enable the constitution to develop in response to changing needs."³² A good example of this

It is of particular interest that Florida, the state which moved earliest and which is generally regarded as the most progressive in the area of expansive Open Meeting Laws, has itself excluded the judiciary from the scope of its act's coverage. And the Supreme Court of Florida has suggested that this exclusion is mandated by the separation of powers doctrine.

Id. at 450 n.11 (citations omitted).

28. See *supra* note 2 and accompanying text.

29. FLA. CONST. art I, § 12.

30. See generally *Perez v. State*, 620 So. 2d 1256 (Fla. 1993); John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 275-79 (1989); Paul R. Joseph, *No Different Drummer: The Effect of the 1983 Amendment to Article I, § 12 of the Florida Constitution*, 5 ST. THOMAS L. REV. 101 (1992); Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

31. See *supra* notes 3-4 and accompanying text; see also John C. Van Gieson, *Gay Ballot is Focus of Court*, THE ORLANDO SENTINEL, Jan. 8, 1994, at D-1.

32. Grad, *supra* note 22, at 972. For an argument that the Florida Constitution is too easy to amend, see Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, FLA. B.J., Jan. 1986, at 43; see also Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509 (1994).

Justice Parker Lee McDonald recently noted that the Florida Constitution "is one of the most easily amended constitutions in the country," primarily through the initiative. Advisory Opinion to the Attorney General—Limited Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. . . .

The power to change both the constitution and statutory law is, theoretically, vested in the people. The power to amend the constitution is implicit in the declaration in article I, section 1, Florida Constitution, that "[a]ll political power is inherent in the people." The 1968 revision of the state constitution adopted the Revision Commission's recommendation to include a section explicitly

needed flexibility is Florida's recent budget amendment,³³ overruling a Florida Supreme Court separation of powers decision.³⁴ The budget amendment was proposed directly to the electorate from the appointed Tax and Budget Reform Commission.³⁵ Taking a longer view, state constitutional flexibility in Florida also has permitted the gradual, piecemeal adoption of many of the progressive recommendations of the 1978 Constitution Revision Commission, despite the defeat of all of its proposals in 1978.³⁶ The article in this Symposium by Thomas C. Marks, Jr. and Alfred A. Colby makes perceptive and well reasoned recommendations for state constitutional change in the future.³⁷

Florida's recent term limit amendment,³⁸ part of a larger national state constitutional movement,³⁹ represents the most important fundamental

dealing with the initiative process. . . . Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments. . . .

. . . At this juncture, rather than espouse any particular solution as to how to prevent such abuse, I merely express my thought that some issues are better suited as legislatively enacted statutes than as constitutional amendments. It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people.

Id. at 1000 (footnotes omitted) (citations omitted). For a theoretical and philosophical discussion of the issue of amending a constitution's provisions for its own amendment, see PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

33. FLA. CONST. art. III, § 19; *see also* Jon Mills, *Battle of the Budget: The Legislature and the Governor Fight for Control*, 18 NOVA L. REV. 1101 (1994).

34. *Chiles v. Children A,B,C,D,E & F*, 589 So. 2d 260 (Fla. 1991).

35. FLA. CONST. art. XI, § 6; *see also* Donna Blanton, Note, *The Taxation and Budget Reform Commission: Florida's Best Hope for the Future*, 18 FLA. ST. U. L. REV. 437 (1991).

36. D'ALEMBERTE, *supra* note 2, at 15; Steven J. Uhlfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Ahead of Its Time*, 18 NOVA L. REV. 1489 (1994); Williams, *supra* note 1, at 139-40. *See generally* Symposium on the Proposed Revisions to the Florida Constitution, 6 FLA. ST. U. L. REV. 565 (1978).

37. Thomas C. Marks, Jr. & Alfred A. Colby, *Some Proposed Changes in the Florida Constitution*, 18 NOVA L. REV. 1519 (1994).

38. FLA. CONST. art. VI, § 4; *see also* P.C. Doherty, *A Quodlibet, A Mumpsimus, and the Rule of Infield Flies: The Unfinished Business of Term Limits in Florida*, 18 NOVA L. REV. 921 (1994).

39. *See* Doherty, *supra* note 38, at 921; *see also* Legislature of the State of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992); LIMITING LEGISLATIVE

change in state legislative structure since the reapportionment mandated by the federal one-person-one-vote decisions. Florida's amendment, as well, applies to the Cabinet.⁴⁰ Actually, the term limit movement revives a fundamental feature of Revolutionary period state constitutions—rotation in office.⁴¹ The problems with the modern version in Florida, described by Dr. Doherty,⁴² sound like the type of “unintended consequences” about which Frank Grad warned.⁴³

There are many stories about Florida constitutional law, going back over a century and a half. Some, in retrospect, are not so pleasant. For example, Eric Foner described the 1868 Reconstruction state constitutional processes in Florida:

Florida's convention, controlled after a series of complex maneuvers by a coalition of business-oriented white Republicans and Whiggish Conservatives, . . . skewed legislative representation in favor of white counties, gave the governor “imperial” powers of appointment, and authorized the legislature to establish an educational qualification for voting. Designed to attract white voters to a moderate Republican party devoted to Florida's economic development, the constitution, commented *The Nation*, “surpasses in conservatism that of any State in the Union.”⁴⁴

More appealing is the story of Governor LeRoy Collins' apparently unsuccessful efforts to secure reapportionment through state constitutional

TERMS, (Gerald Benjamin & Michael J. Malbin eds., 1992); Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992); Erik H. Corwin, *Recent Developments, Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569 (1991); Gary F. Moncrief et al., *For Whom the Bell Tolls: Term Limits and State Legislatures*, 17 LEGIS. STUD. Q. 37 (1992).

40. See Stephen T. Maher, *The Florida Cabinet: Is It Time for Remodeling?* 18 NOVA L. REV. 1123 (1994). Also on Florida's Cabinet, see Malcomb B. Johnson, *Why We Should Keep Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 603 (1978); Joseph W. Landers, Jr., *The Myth of the Cabinet System: The Need to Restructure Florida's Executive Branch*, 19 FLA. ST. U. L. REV. 1089 (1992); Jon C. Moyle, *Why We Should Abolish Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 591 (1978).

41. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 521-22 (1969).

42. Doherty, *supra* note 38, at 921.

43. See *supra* note 22, 23 and accompanying text.

44. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 323 (1988) (footnotes omitted) (citing Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 FLA. HIST. Q. 5-7, 15-16 (July 1992)).

amendment in Florida. Sandy D'Alemberte and Frank Sanchez recount the story:

Years later, after Collins left the Governor's Office, he attended a dinner in Washington in which he sat next to Justice Hugo Black. Justice Black asked Governor Collins if he had experienced any serious failures as governor. Collins responded that his biggest failure was his inability to achieve fair legislative apportionment. Justice Black responded, "That was not a failure," and explained that Florida's inability to resolve the reapportionment issue had played an important role in the Court's deliberations in the Tennessee case and in the other cases that followed. The fight for fair apportionment that Collins started was finally won almost a year after he left office.⁴⁵

Of course, it was reapportionment mandated by the United States Supreme Court that led to state constitutional modernization in Florida in 1968.⁴⁶ The 1968 state constitution was the result of what Justice E. Harris Drew called the "long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968"⁴⁷ Still, however, the Florida Constitution retains the process of *legislative* reapportionment each decade, which as demonstrated by George Waas,⁴⁸ is fraught with problems.⁴⁹

Florida is one of only a few states⁵⁰ to constitutionalize the right to collective bargaining.⁵¹ Dean Roger I. Abrams' article reflects the application of this state constitutional provision, implemented by statute, in the context of public sector arbitration.⁵² Richard Sicking's piece fills out

45. Talbot "Sandy" D'Alemberte & Frank Sanchez, *A Tribute to a Great Man: LeRoy Collins*, 19 FLA. ST. U. L. REV. 255, 262 (1991) (footnotes omitted).

46. D'ALEMBERTE, *supra* note 2, at 12; Williams, *supra* note 1, at 135-36.

47. *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970).

48. George L. Waas, *The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution*, 18 NOVA L. REV. 1001 (1994).

49. The 1978 Constitution Revision Commission proposed the establishment of a Reapportionment Commission to take the politically charged matter of legislative reapportionment out of the Legislature. See Elaine S. Williams, *A Summary and Background Analysis of the Proposed 1978 Constitutional Revisions*, 6 FLA. ST. U. L. REV. 1115, 1126-30 (1978).

50. Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 731-32 (1987).

51. FLA. CONST. art. I, § 6.

52. Roger I. Abrams, *Public Sector Collective Bargaining: An Arbitrator's View of the State Constitution*, 18 NOVA L. REV. 733 (1994); see also D'ALEMBERTE, *supra* note 2, at

the picture with respect to the funding of public employee pensions and the enforceability of negotiated pay raises.⁵³

All of the articles in this Symposium tell stories of, and about, state constitutional law. State constitutional stories of the militia,⁵⁴ gambling,⁵⁵ the state flag,⁵⁶ homestead exemption,⁵⁷ and municipal home rule⁵⁸ are also told here. These stories are, almost exclusively, *legal* stories about *Florida* constitutional law. This is, of course, to be lauded and encouraged.⁵⁹ But, a fully developed study of state constitutional law should also be *interdisciplinary* and *comparative*, and include state constitutional history and theory.⁶⁰ As I continue to argue:

Many common themes appear in the constitutional law of all states. They share many of the same issues, despite differences in how such issues may be resolved in each state. . . . [Study should] focus on these common themes and issues, which are likely to arise in any jurisdiction.

24; Elaine S. Williams, *Alternatives to the Right to Strike for Public Employees: Do They Adequately Implement Florida's Constitutional Right to Collectively Bargain?*, 7 FLA. ST. U. L. REV. 475 (1979).

53. Richard A. Sicking, *Shoot the Patient or Find the Cure: The Florida Constitutional Requirement that Increases in Public Employee Pensions Be Funded on a Sound Actuarial Basis*, 18 NOVA L. REV. 1465 (1994).

54. Anthony J. Scaletta, Note, *The Governor's Troops Under the Florida Constitution*, 18 NOVA L. REV. 1133 (1994).

55. Eugene Bardakjy, Note, *Is There a Lucky Seven in Florida's Future?*, 18 NOVA L. REV. 1065 (1994). On gambling and state constitutions, see generally Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211 (1985); Grad, *supra* note 22, at 950 n.66, 955-56.

56. Robert M. Jarvis, *The History of Florida's State Flag*, 18 NOVA L. REV. 1037 (1994).

57. Donna Litman Seiden, *There's No Place Like Home(stead) in Florida—Should it Stay that Way?*, 18 NOVA L. REV. 801 (1994).

58. Ilene S. Lieberman & Harry Morrison, Jr., *WARNING: Municipal Home Rule is in Danger of Being Expressly Preempted by . . .*, 18 NOVA L. REV. 1437 (1994).

59. After all, as Professor Richard Kay has observed:

The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope. . . . It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.

Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667, 667 (1984).

60. Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMPLE L. REV. 1145, 1149 (1993).

This will, in turn, accent the importance of the unique language and judicial interpretation of the constitutions of the states in the resolution of specific issues.⁶¹

Attention to "horizontal federalism,"⁶² or the treatment of issues in the constitutional texts or judicial interpretations of other states, is a central feature of state constitutional law. As Justice Hans A. Linde of Oregon noted: "Diversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well as in those of the United States Supreme Court."⁶³ It is in this sense that state constitutional law must be comparative.⁶⁴

Many of the current topics of interest in Florida constitutional law are national in scope. I noted this with respect to the term limit movement,⁶⁵ but it is true as well in the areas of, for example, victims' rights,⁶⁶ limitations on state legislative mandates to local governments,⁶⁷ and English

61. ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 2 (2d ed. 1992); see also Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL ED. 243, 246-47 (1991); Robert F. Williams & Earl M. Maltz, *Introduction, Annual Issue on State Constitutional Law*, 20 RUTGERS L.J. 877, 878-79 (1989); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172-73 (1983).

62. This is a term from MARY C. PORTER & G. ALAN TARR, *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* xxi-xxii (1982).

63. *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983). Former Justice Linde has cautioned, however, that state constitutions are not all alike and cannot be treated simply as "common law." See generally Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

64. In the words of New Jersey Supreme Court Justice Stewart G. Pollock, "[H]orizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century." Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).

65. See *supra* note 39 and accompanying text.

66. See *supra* note 24 and accompanying text; see also Thomas B. Dixon, Comment, *Arizona Criminal Procedure After the Victims' Bill of Rights Amendment: Implications of a Victims' Absolute Right to Refuse a Defendant's Discovery Request*, 23 ARIZ. ST. L.J. 831 (1991); Don Siegelman & Courtney Tarver, *Victims' Rights in State Constitutions*, EMERGING ISSUES IN ST. CONST. L. 163 (1988).

67. See *supra* note 25 and accompanying text; see also WILLIAMS, *supra* note 60, at 789-92; Joseph F. Zimmerman, *The State Mandate Problem*, 19 STATE AND LOCAL GOV'T REV. 78 (Spring 1987).

language amendments.⁶⁸ Budget control, and legislative-executive clashes with the judiciary as arbiter, occur in many states.⁶⁹ State constitutional amendments, some of which require “forced linkage”⁷⁰ or lockstep with federal constitutional interpretation, are a national phenomenon.⁷¹ Further, the process of state constitutional change, particularly through the initiative, is the topic of an important national debate.⁷² Other aspects of the processes of state constitutional change, such as periodic revision, are also of national interest.⁷³

Without both deeper and broader views of state constitutional law, encompassing constitutional theory⁷⁴ and history,⁷⁵ as well as comparing

68. See FLA. CONST. art. II, § 9; Donna M. Greenspan, Note, *Florida's Official English Amendment*, 18 NOVA L. REV. 891 (1994); see also D'ALEMBERTE, *supra* note 2, at 41; WILLIAMS, *supra* note 60, at 1003; Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

69. See *supra* notes 33-34; see also *Judy v. Schaefer*, 627 A.2d 1039 (Md. 1993); Louis Fisher, *The Effects of a Balanced Budget Amendment on Political Institutions*, 9 J. LAW & POL. 89 (1992).

70. See *supra* note 30 and accompanying text; see also BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 7, 37-38 (1991).

71. For literature on this phenomenon, see Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the “New Federalism,”* 8 U. PUGET SOUND L. REV. vi, x-xi (1985); James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); JoAnne Frankfurt & Amy Rodney, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 GOLDEN GATE U. L. REV. 611 (1980); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 169-79 (Winter 1987); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984); Witte, *supra* note 3.

72. See, e.g., Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment By Initiative Petition*, 17 OKLA. CITY U. L. REV. 3 (1992); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government:” The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Witte, *supra* note 3.

73. See, e.g., Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473 (1987); Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563 (1982); Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421 (1970).

74. As G. Alan Tarr described it:

[O]ne might have expected a lively dialogue between constitutional theorists and

state constitutional texts and judicial interpretations, the discourse about the topic will continue to be “impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish.”⁷⁶

Academic commentators and state courts must begin to engage in what Professor Paul Kahn recently described as “a process of giving voice to the state court’s understanding of the values and principles of the national community.”⁷⁷ Kahn concluded that constitutional discourse, both state and federal, will be “enriched because fifty different courts will talk with each other, as well as with the federal courts, about the meaning of a *common enterprise*.”⁷⁸ Having due regard for textual differences, the judicial interpretation of state constitutions can be part of a “common enterprise.”⁷⁹ He elaborated this point as follows:

Just as his contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court’s interpretive effort. The diversity of state

state constitutional scholars. However, no such dialogue has developed. Indeed, what is striking is how little attention scholars and jurists have paid to the relationship between constitutional theory and state constitutional law.

G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842 (1991) (footnotes omitted); see also G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169 (1992).

75. As Stephen E. Gottlieb stated:

Constitutional history is valuable whether or not one subscribes to a jurisprudence of original intent. For those who do, history becomes controlling — important because it does, or should, determine constitutional interpretation. For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen. State constitutional history has become more important as the United States Supreme Court has become less protective of individual rights.

Stephen E. Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989); see generally TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

76. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992). Professor Gardner mounts a broad critique of state constitutional law itself. For responses, and Gardner’s defense, see *Roundtable on James Gardner’s Failed Discourse of State Constitutionalism*, 24 RUTGERS L.J. 907-1056 (1993).

77. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1168 (1993) (emphasis added).

78. *Id.* (emphasis added).

79. *Id.* at 1168.

courts, each claiming a unique authority, did not prevent their engagement in a common interpretive enterprise.⁸⁰

Fortunately, there are a number of new materials available to aid in this broader, and deeper, common enterprise. Jennifer Friesen's *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* was published by Matthew Bender in 1992.⁸¹ This is the most important new treatise on state constitutional law since Cooley's *Constitutional Limitations*.⁸² Barry Latzer's *State Constitutions and Criminal Justice*, providing a comprehensive national treatment of state constitutional criminal procedure decisions, was published in 1991 by Greenwood Press. *Rutgers Law Journal* publishes an Annual Issue on State Constitutional Law, now in its fifth year, which includes a comprehensive national survey of all state constitutional decisions. Various bibliographies have been published.⁸³

State-specific studies such as this Symposium, when linked with other regional and national perspectives on state constitutions, and their interpretation, will contribute to the common enterprise of understanding the full reaches of American constitutionalism.

80. *Id.* at 1163.

81. See Michael Libonati, *Book Review*, 66 TEMP. L. REV. 1329 (1993).

82. See Williams, *supra* note 60, at 1148.

83. See, e.g., CONSTITUTIONS OF THE STATES: A STATE BY STATE GUIDE AND BIBLIOGRAPHY TO CURRENT SCHOLARLY RESEARCH (Bernard D. Reams, Jr. & Stuart D. Yoak eds., 1988); TIM J. WATTS, STATE CONSTITUTIONAL LAW DEVELOPMENT: A BIBLIOGRAPHY (1992); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-1989*, 20 RUTGERS L.J. 1093 (1989).